IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 261 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA Sd/-

HON'BLE MS.JUSTICE H.N.DEVANI Sd/-

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
U K TEXTILE - Respondent(s)

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Appearance :

MR TANVISH U.BHATT for Petitioner No(s).: 1.
SERVED BY RPAD - (N) for Respondent No(s).: 1.

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CORAM :HON'BLE MR.JUSTICE D.A.MEHTA

AND

HON'BLE MS.JUSTICE H.N.DEVANI

Date : 13/07/2005

ORAL JUDGMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 The following question has been referred by the Income Tax Appellate Tribunal, Ahmedabad Bench 'B' under Section 256(1) of the Income Tax Act,1961 (the Act) at the instance of the Commissioner of Income Tax.

> "Whether, the appellate Tribunal is right in law and on facts in setting aside the order made by the CIT u/s. 263 of the Act whereby he had directed the Assessing Officer to consider the aspect of registration to the assessee firm in view of the fact that the assessee firm had not carried out any business activity and that it had only let out its building and machineries thereby earning leases rent only ?"

2 The Assessment Year is 1988-89. The assessee Firm was constituted for the purpose of carrying on business of job work of printing of cotton sarees. The assessee was assessed under Section 143(1) of the Act. The Commissioner of Income Tax, Rajkot (CIT) took action under Section 263 of the Act on the ground that

though the Firm was constituted for the purpose of carrying on business it had not carried on any business activity but let out building along with machineries and was earning lease rent. That enjoyment of lease rent does not amount to any business activity. He therefore proposed to treat the action of the Assessing Officer in granting registration to the assessee Firm to be erroneous and prejudicial to the interests of the revenue. After hearing the assessee's representative he passed the following order.

> " 4. In the circumstances, the assessment made by the Assessing Officer granting registration for the above year is set aside with a direction to frame the assessment denovo on the limited issue as stated above in view of the observations made by me above and after providing a reasonable opportunity in the assessee to state its case".

3 The assessee carried the matter in appeal before the Tribunal. The Tribunal allowed the appeal vide order dated 3.9.1992 by holding as under :

> "8. We are of the opinion that the

argument of the learned D.R. that the business should be also carried by the assessee under all circumstances, cannot be a good argument. The reason is under given circumstances in order to over-come temporary lull if the assessees gives the business to some third party, for a short time, who is experienced in the line of business that does not amount the cessation of business of partnership firm and on that ground alone the registration cannot be refused.

9. Even otherwise as reproduced above in Paragraph 6 on the basis of the clause 4 of the partnership deed, the registration of the firms cannot be denied because " the partnership shall be authorised to carry on any other legitimate business" also include the handing over of the business and accepting the rent in turn.

10. In the result, for the reasons stated herein above, we set aside the order of the CIT (A) and the order of the ITO is restored".

4 Heard Mr.Tanvish U.Bhatt, learned Standing Counsel for the applicant-revenue. Though served there is no appearance on behalf of the respondent assessee.

5 For the reasons that follow hereinafter the Court finds itself unable to answer the question and

hence the Reference is returned unanswered.

6 The CIT in his order states that the assessee Firm was not entitled to registration under Section 185 of the Act. That the assessee Firm had not carried on the business of job work of printing sarees at any time and the factory premises along with plant and machinery were leased out. That income from lease rent is to be taxed under the head "*income from other sources*".

7 As against that the Tribunal records in its order that the Firm was constituted on 20.8.1981 consisting of five partners. The assessee is engaged in the business of dyeing and printing of cotton sarees. In the year 1982 the assessee Firm acquired land on lease and erected plant and machinery. Thereafter the Tribunal while recording the order of Commissioner in paragraph No.3 of its order states that according to CIT the assessee is not entitled for continuation of registration under the Act. As already

noticed the Tribunal states that the factory premises and plant and machinery were let out to overcome temporary lull in the business and there was no cessation of business.

8 In light of the conflicting findings of the CIT and the Tribunal coupled with the fact that the Assessment Year under consideration is 1988-89, it is not possible to state whether this was the year of registration or continuation of registration already granted in earlier year. The Tribunal has recorded that the Firm was constituted on 20.8.1981. Neither of the authorities have found as to what was the factual position since the date of constitution of the Firm upto the year under consideration.

9 The Scheme of the Act as regards Registration of Firms shows that the Procedure of Application for registration is laid down in Section 184 of the Act. Section 185(1)(a) of the Act permits the Assessing Officer to grant registration in the event of the

necessary formalities prescribed by the Act and the Rules having been complied with after finding that there was a genuine Firm in existence. Under Section 185(4) of the Act, once the registration is granted for any assessment year the said registration continues and no further and fresh inquiry is called for. This becomes clear from sub-section (7) of Section 184 of the Act.

10 As noticed hereinbefore neither CIT nor the Tribunal have taken the basic care to place on record relevant and material facts as to whether the Firm was being registered for the first time or it was continuation of registration that was being disturbed. In case only continuation of registration was sought to be disturbed, by virtue of Section 184(7) of the Act such an exercise would not be permissible, unless and until, by following the procedure prescribed under Section 186 of the Act registration granted for initial year is cancelled. In absence of these foundational facts it is not

possible to state one way or the other and the Court is not in a position to answer the question.

11 As to whether an assessee can be said to have carried on business when business assets are let out is no longer res-integra and this Court has laid down the principles in the case of *Commissioner of Income Tax Vs. New India Industries Ltd. (1993) 201 ITR 208.* It was necessary for the Tribunal to have applied its mind to the aforesaid aspects before determining as to whether the letting out of the factory premises and plant and machinery was for the purpose of earning rent or was exploitation of commercial assets in the course of business.

12 In the result, the question is left unanswered. The Reference is returned to the Tribunal to adjust its decision while deciding the appeal finally in accordance with the provisions of law and settled legal position.

13 The Reference stands disposed of accordingly.

There shall be no order as to costs.

(D.A.Mehta, J) (H.N.Devani, J)

m.m.bhatt